

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALDO WALDEN,

Defendant-Appellant.

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UNPUBLISHED

March 7, 2006

No. 254386

Wayne Circuit Court

LC No. 03-009538-01

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under thirteen years of age). Defendant was sentenced to concurrent terms of 17-½ to 40 years' imprisonment for each CSC I conviction. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant's sole argument on appeal is that he was denied his right to a fair trial due to prosecutorial misconduct. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Specifically, defendant argues that the prosecutor improperly elicited hearsay testimony to which MRE 803A<sup>1</sup> did not apply and made a civic duty argument to the jury during closing argument.

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<sup>1</sup> MRE 803A provides as follows:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

(1) the declarant was under the age of ten when the statement was made;

(2) the statement is shown to have been spontaneous and without indication of manufacture;

(continued...)

Because defendant failed to preserve this issue, we review for plain error affecting defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). To warrant reversal, defendant must establish his actual innocence or that the error found seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

On July 27, 2003, the victim's mother drove the victim, then aged ten, to the home of the victim's aunt. Shortly after the victim's arrival, her aunt left the house, leaving the victim and another child in defendant's care. Soon thereafter defendant assaulted the victim on the living room couch. The victim testified at trial that defendant penetrated her with his finger and his penis, and that defendant performed cunnilingus on her. The eleven-year-old son of the victim's aunt testified that he saw the victim crying during the course of the weekend. When the boy asked her why she was crying, the victim replied that defendant was "poking her" while she was on the couch. The victim's mother testified that during the ride home on July 29, 2003, the victim began crying and eventually told her about the assault.

Defendant first argues that the prosecutor committed misconduct by deliberately eliciting inadmissible hearsay testimony. Viewing the challenged questions and responses in context, it is apparent that the prosecutor did not deliberately elicit improper testimony. *Thomas, supra* at 455. The prosecutor's questions were open-ended without suggesting any specific response and merely asked the witnesses to elaborate on their prior testimony. A defendant may not base a claim for prosecutorial misconduct on a prosecutor's good faith attempt to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Further, defendant fails to show the requisite prejudice in light of the strength of the victim's testimony.

Second, defendant argues that the prosecutor made an improper civic duty argument to the jury when she stated during closing argument that "crimes like this happen to children every

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(...continued)

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

day, every day, and there is never any evidence, and that's just a sad reality . . . .” A prosecutor may not request a jury to convict a defendant on the basis of civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, it is clear that the prosecutor was not appealing to the jury's sense of civic duty in the cited portion of her argument. Indeed, following the challenged statement the prosecutor explained, “I'm not asking you to find this man guilty for what somebody else may have done . . . I'm asking you to find him guilty for what he did to” the victim. Rather, it appears that the prosecutor was simply and properly commenting on the lack of evidence supporting the victim's testimony, including the lack of physical evidence. Moreover, the court instructed the jury that counsel's arguments and questions to witnesses are not evidence and that the jury should convict based only on the evidence presented. *Id.* at 281.

Affirmed.

/s/ Stephen L. Borrello  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald